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INDIAN LAND WORKING GROUP

"Taking A Stand On Indian Land"

TESTIMONY BEFORE THE SENATE COMMITTEE ON INDIAN AFFAIRS

BY AUSTIN NUNEZ, CHAIR OF THE INDIAN LAND WORKING GROUP AND CHAIR OF THE SAN XAVIER DISTRICT OF THE TOHONO O'ODHAM NATION

ON S.1340, A BILL TO AMEND THE INDIAN LAND CONSOLIDATION ACT

MAY 22, 2002

Honorable Chairman and Members of the Committee, I appreciate the opportunity to address this Committee on these very important and complex matters related to Indian trust allotments, specifically S.1340, "a bill to amend the Indian Land Consolidation Act to provide for probate reform with respect to trust or restricted lands".

Currently, I serve as Chair of the Indian Land Working Group, as well as Chair of the San Xavier District of the Tohono O'Odham Nation.

As currently written, S. 1340, the Indian Probate Reform Act and it's predecessor, the Indian Land Consolidation Amendments of 2000 (P.L. 106-462) contain serious flaws that complicate tribal and individual land management, make administration of trust allotments more difficult, and threaten the trust status of allotted lands.

In order for true probate reform and effective management of trust allotments to occur, the following areas must be addressed within S.1340.

CURRENT LAND TITLE INFORMATION IS NECESSARY FOR SYSTEM REFORM. Title documents must be corrected to reflect real ownership. It is a travesty that approximately 13,000 fractionated interests have not been returned to legal Indian heirs; a clear violation of the Supreme Court decision in Babbitt v.Youpee (117 S CT.727 1997).

In addition, there is a current probate backlog of nearly 8,000 cases (Indian Probate Reinvention Lab – Phase II, December '99 – Background) impacting thousands of Indian heirs and landowners. THIS HAS PUT A HUGE STALL ON REAL ESTATE TRANSACTIONS ON INDIAN TRUST ALLOTMENTS. One can only imagine the public outcry which would occur if state and county entities maintained title documents in the same manner.

- REPEAL THE 5% JOINT TENANCY WITH THE RIGHT OF SURVIVORSHIP (JTWROS) FEATURE (SECT. 2206). In intestate (no will) cases where a fractionated land interest is less than 5% of an allotment (in an allotment of 160 acres this would be anything less than 8 acres!) only the surviving tenant can will this interest to his/her heirs. No jurisdiction (State or Foreign) now uses or has ever used joint tenancy for intestate descent and distribution; it is an anti-estate planning procedure.

- AMEND S.1340 TO PROVIDE FOR JUDICIAL REVIEW IN SECTION 2214. The current Department of Interior appraisal system gives the Regional Appraiser "final approval for the specific values generated by the appraisal systems". The restriction of judicial review to section 207 (Decent and Distribution) only, suggests that adversely affected property owners have no legal recourse against appraisals they don't agree with.

- REPEAL THE DEFINITION OF INDIAN (SECTION 2201). This definition cuts off thousands of persons who now qualify as Indian under other federal laws – yet are unaffiliated (not enrolled) for a variety of different reasons. At the Standing Rock Sioux Reservation alone, 4,096 heirs representing 14,749 acres will not be able to pass their land on to their children. Only eight tribes have written probate codes that are more restrictive than the former requirement for inheriting trust lands, i.e., documentable Indian blood. To the ILWG, this means that tribes want to stay with bloodline determinations for inheritance purposes, not blood quantum.

- CORRECT THE CURRENT LAND ACQUISITION PILOT PROGRAM: Individual Indian landowners must be included in all acquisition pilot projects to assure consolidation of fractionated land title; otherwise the tribe, often a stranger to title, becomes a co-owner in an allotment. This further complicates title and creates additional records. Currently, the Secretary is making indiscriminate purchases of fractionated interests within the designated pilot project reservations. Purchases are not tied to individual or tribal use plans; tribal laws, ordinances, and land consolidation plans are not a required consideration for these purchases.

We recommend that the Committee incorporate the Management, Accounting, and Distribution (MAD) system into all current and future Acquisition Pilot Projects. This system is being used by tribes within the Great Plains Region for local management and processing of income derived from fractionated interests.

This system can also be used for other real estate related transactions, e.g., gift deeds, sales and purchases. This system works; the DOIS Trust Asset and Accounting Management System - TAAMS - does not!

- AMEND S.1340 TO PROTECT THE TRUST STATUS OF OFF-RESERVATION ALLOTMENTS. There has been no evaluation to determine the impact of this provision upon impacted Indian owners and their heirs. If the owner of a trust allotment is not Indian under the new P.L. 106-462 definition, the off-reservation interests pass to heirs in fee status, further diminishing the trust land base.

  While California was excluded from coverage in P.L. 106-462, this provision continues to have a negative impact on other Indian owners who will have no way of knowing that their interests have gone to fee and will become subject to state taxation. It is the job of the Trustee to preserve the corpus of the trust – THE LAND – not to dissolve it.

- LIMIT THE USE OF NON-APA ADJUDICATORS (I.E. ATTORNEY DECISIONMAKERS) FOR INDIAN ESTATE PROCEEDINGS AND REQUIRE A SUNSET PROVISION FOR THIS PRECEDURE.

  Without legal authorization, the Department of Interior, is using non-APA (Attorney Decisionmakers [ADM]) proceedings – instead of a probate hearings – as the primary means of processing Indian probates. By amending 25 USC 372, the Department of the Interior is permanently affording Indian landowners - to whom it has a trust responsibility - lesser protections in law than it affords permittees and licensees on Public Lands. To get a hearing, rather than be assigned an ADM, heirs must make their request for a hearing, 20 days from the date of notice.

  AN ADDITIONAL AND DETAILED ANALYSIS OF S.1340 PROVISIONS IS CONTAINED IN THE ATTACHMENTS LISTED AT THE END OF THIS TESTIMONY

A LEGISLATIVE HISTORY – FOR THE RECORD

In 1997, the Administration developed and introduced a legislative proposal to address management of trust allotments, H.R. 2743. This proposal was never endorsed by tribes and landowners, and in fact was unanimously opposed by both of these entities.

The bill lacked any provision for assistance to tribes and landowners for consolidating allotment ownership. Tribes and landowners need access to land data, technical assistance, and capital in order to effectively consolidate and reduce multiple ownership. H.R. 2743 did nothing to address this need.

Concurrent with this effort, the Indian Land Working Group (ILWG) developed a comprehensive legislative proposal for solving issues related to fractionation, H.R. 4325. This legislation was introduced in the 105th Congress, 2nd Session (1998). H.R.4325 was formulated with extensive input from tribes, individual landowners, and probate/realty practitioners during the Annual Indian Land Consolidation Symposiums and legislative meetings held throughout 1995 – 1999.

H.R. 4325 established a comprehensive estate planning program; provided for local development and maintenance of land data systems; removed regulatory barriers to make it easier to gift deed, sell, and exchange land interests; provided a uniform probate code that prevented non-Indian inheritance; and established a land acquisition program for tribes and individual Indian landowners for acquisition and consolidation of fractionated interests.

In December of 1998, representatives of the ILWG and the Department of the Interior were invited to meet with staff from the Senate Committee on Indian Affairs for the purpose of developing a compromise bill by combining the two legislative proposals that were before them, H.R. 4325 and H.R. 2743. The compromise version became know as S.1586. This bill was crafted by Department of Interior representatives and a single Senate Committee staff person, with minimal input from tribes or individual landowners. S.1586 includes several provisions from the original H.R. 4325, but otherwise there was no compromising.

On November 4, 1999 hearings were held on S.1586. Tribes and individual landowner associations testified in opposition to many of the provisions in the bill. (See hearing record for testimony before the Senate Committee on Indian Affairs, S.1586 "Indian land Consolidation Amendments of 1999); especially the inclusion of a "2% rule", which was removed from the final version of S.1586. In spite of continued opposition, S.1586 was enacted, and became the Indian land Consolidation Amendments of 2000. P.L. 106-462. S.1340 adds further amendments to the Indian Land Consolidation Act, ignoring the detrimental impact that P.L. 106-462 will have on Indian Country.

TERMINATION BY DEFINITION - SECTION 2201

Prior to the enactment of the Indian Land Consolidation Act Amendments of 2000, land could be inherited in trust status by persons of "documentable Indian blood". The current definition of Indian contained in the Amendments will cut off far too many people who now qualify as Indian under other federal laws – yet are unaffiliated (not enrolled) for a variety of reasons. As mentioned previously, at the Standing Rock Sioux Reservation alone, 4,096 heirs representing 15,749.44 acres will not be able to inherit. These numbers are alarming; no one knows the overall impact; how many tracts and acres are involved; not to mention the land values.

Defining who can inherit is a tribal authority and needs to be determined by each tribal community. Tribes have the power to determine their own membership and to formulate probate codes. The fact that only 8 tribes have implemented codes which are more restrictive than the "documentable Indian blood" requirement, says that most tribes do not want to cut off lineal descendants.

A restrictive definition of Indian for purposes of inheritance is another attempt by the Administration and Congress to reduce the number of Indians and to reduce the Indian budget. This definition, flys in the face of the written objectives of the law – to preserve trust status and promote consolidation of fractionated interests. If an Indian landowner cannot pass land on to their own children, because they cannot qualify for membership, the trust status of land will certainly be jeopardized and the legal challenges will certainly be forthcoming. Were a similar effort undertaken for any other racial group within the American society, there would be a riot.

P.L. 106-462 defines Indian, as "any person who is a member of any Indian Tribe or is eligible to become a member of any Indian tribe, or who has been found to meet the definition of "Indian" under a provision of Federal law if using such law's definition is consistent with the purposes of this chapter".

Interior is currently interpreting "under a provision of Federal Law" to include only the Indian Land Consolidation Act; excluding any other definition of Indian, such as is contained in the Indian Reorganization Act or the Indian Child Welfare Act, to name but a few of the 80 plus definitions of Indian contained in federal laws.

This interpretation will exclude persons with multiple tribal ancestors who are not enrolled or eligible to be enrolled at any one tribe, even though they are ¼ or ½ Indian blood from several different tribes. It also excludes heirs who are from non-federally recognized and terminated tribes.

Prior to the Amendments, heirs were determined by "documentable Indian blood". Now Administrative Law Judges, Attorney Decisionmakers, Probate Officers and Clerks, will need to research whether or not a person is a member, or eligible to become a member of a tribe. Parents of children who do not meet this restrictive interpretation will be inclined to fee patent or gift deed their land so that their property can be left to their children.

CREATION OF JOINT TENANCY WITH RIGHT OF SURVIVORSHIP – SECTION 2206

For persons dying without writing a will (intestate) the amendments create a "joint tenancy with right of survivorship" (JTWROS - section 2206[c]), for land interests which are less than 5% of a tract. In a 160 acre parcel this would mean anything under 8 acres. For most Indians, this amount of acreage may mean a potential homesite which may be willed or partitioned for this purpose. Section 2206 bars this action. Research on probate laws, in the U.S., England, France and Uniform Succession Laws (international) shows there is not a single instance in which JTWROS has been implemented to address intestate matters. Section 2206 is new and untested law; another experiment.

A joint tenancy does not require probate of interests as each tenant dies, only the last survivor. The last tenant to survive has "the right of survivorship" and can will the property to heirs. Currently, Interior cannot account for money in tribal and individual accounts in the billions of dollars, the last estimate being at least $10 billion. How is Interior going to certify that it will be able to track heirs within a joint tenancy situation? They can't – and even if they could – joint tenancy is an estate planning instrument, which is best used in circumstances where there are close-knit family units – seven brothers and sisters agreeing by drafting a will together - that the last of them to survive will own the land.

Contrast this with a situation where 30, 50, and 60 heirs from 3 marriages are thrown into a JTWROS where no one in the family knows everyone else; most don't know the other family components; and they are looking to Interior to tell them who the heirs are.

Speaking from 25 years of Indian probate experience, former Administrative Law Judge, Sally Willett says "If the family members do not know each other, then over time when and if someone figures out that all other heirs might be dead, the family or the government would have to go back, investigate and reconstruct the family history in order to ascertain, if possible, who died, when….. in order to determine whom the survivor was. This would be a monumental, costly, labor intensive task".

The Joint Tenancy Provision cannot take effect until six months after the Secretary certifies in the Federal Register "that the Department of the Interior has the capacity, including policies and procedures, to track and manage interest in trust or restricted land held as joint tenants with the right of survivorship." To date, this certification has not taken place.

CONTINUED BREACH OF TRUST RESPONSIBILITY

For proper management of trust property, title documents must be kept current. The Department of Interior continues to mismanage thousands of allotments, currently totaling over 10 million acres. There are no provisions in this P.L. 106-462 which address the probate backlog (see Indian Probate Reinvention Lab - Phase II, December '99 – Background) and the return of 2% interests mandated by the 1997 Supreme Court decision in Babbitt v. Youpee (117 S CT. 727 (1991), whereby the "2% rule" was declared unconstitutional.

The probate backlog and/or the unconstitutionally taken 2% interests which have not been returned, impact virtually every allotment in Indian Country. Where title has not been corrected to reflect current ownership, real estate transactions – involving acquisition loans, sales, and exchanges – cannot be completed. Allotment owners' hands are tied until title records are corrected to reflect actual ownership.

In September of 1998, the Assistant Secretary of Indian Affairs directed the Deputy commissioner of Indian Affairs to reopen all probates where 2% property interest had escheated to Indian Tribes under 25 U.S.C. Section 2206 of the ILCA This order was initiated to begin the legal process of returning the 2% interests to the rightful heirs, to comply with the Supreme Court Decision in Youpee.

To this day, an estimated 13,000 interests have not been returned. This means that title documents on thousands of allotments are outdated and do not reflect the true owners. This is certainly a breach of the trust responsibility related to management of these allotments.

A FLAWED ACQUISITION PROGRAM – SECTION 2212

The acquisition program in this law provides for Secretarial purchase of fractionated interests. Indiscriminate purchase of fractionated interests by the Secretary of the Interior is a far cry from tribal and individual self-determination – it will not lead to consolidation. It is paternalism at it's best.

True consolidation of fractionated interest means that a priority right of purchase be established within allotments to allow - heirs of the original allottee, then co-owners, then other Indian individuals, then the tribe – the opportunity to purchase interests that are for sale. Purchases should be tied to a personal consolidation, or use plan, e.g., homesite use, enterprise, or extended family use (hunting, fishing, wood gathering, recreation). Tribal laws and ordinances need to be considered.

Indian individuals impacted by fractionation need access to acquisition dollars for consolidation. Financial institutions rarely lend to Indian individuals for purchase of "fractionated interests" on trust property. An acquisition program, similar to the one contained in P.L. 106-462 has already been tried and it proved to be a dismal failure.

Under the USDA's "Indian Land Acquisition Program" many tribes borrowed money to purchase fractionated interests; individuals were excluded from this process. The purchases were not tied to tribal or individual land consolidation plans.

Today 27 tribes are in loan write-down situations because the income derived from the fractionated interests purchased under this program, was not enough to repay the loans (see Federal Register/Vol.64, No.211/Tuesday, Nov.2, 1999/Proposed Rules). A successful acquisition program must be tied to estate planning; land consolidation plans; tied to economic development plans with payback potential; and most importantly be available to individual Indian landowners.

Most disturbing, the Fund allows, and in fact encourages, Secretarial purchase of fractionated interests which should have already been returned Indian landowners as directed by the Supreme Court in Babbitt v. Youpee (117 S CT. 727 1997).

Worst yet, there is no true estate planning program that addresses fractionation at the starting point – on allotments where there is sole ownership, or very few co-owners. This is the time when estate planning options must be presented to Indian landowners – devising one interest to one heir, gift deeding, exchanging, etc. – in order to prevent allotments from further fractionating.

Additionally, Interior's land acquisition program involves setting up a system to account for the income derived from the land interests purchased under the acquisition program. When the land is paid for, or when 20 years has passed – whichever comes first – the land is returned to the tribe. Knowing Interior's recordkeeping capabilities, it would appear that tracking the income derived from these interests would be too great a task for the Department.

Related to this, Interior testified in hearings on the Amendments, that for each purchase they make, a record is closed – claiming that the Secretarial land acquisition program reduces records.

They failed to mention that for each record that is closed, a new one must be opened to track income derived and real estate transactions related to each interest. And then, what happens when the interest that is purchased is part of a joint tenancy with right of survivorship? Is it getting complicated yet?

RESERVATION-WIDE APPRAISALS TO ESTABLISH FAIR MARKET VALUE (2214)

The appraisal system is structured to give the Regional Appraiser final analysis of the "supporting statistical data and applicable testing/reconciliation method and final approval for the specific values generated by the appraisal systems" provided for in Section 2214. It should also be noted that 2206(e) does not expressly require fair market value determinations to support trust-to-trust "consolidation agreements approved by Administrative Law Judges or Attorney Decisionmakers.

Considering the BIA's track record on appraisals, this is an outrageous proposition. A few examples: lease rates for lakefront properties on the Leech Lake Reservation had been based on 1983 property values until the Tribe contracted the leasing program in 1999; Leases income on 19 agricultural allotments on the Ft. Hall Reservation increased by $2.075 million for a 5 year period over what had formerly been derived under BIA lease agreements. The Ft. Hall Landowners Alliance negotiated the lease agreements using current market values.

Unfortunately these examples are typical, as the BIA uses inappropriate and outdated data to assess leasing rates. Although the law cites USPAP (Uniform Standards of Professional Appraisal Practice) there is no provision for staffing or compliance reviews to assure that these standards are being met.

In closing, I would also like to submit for the hearing record, the ILWG position in regards to the Reorganization of the Department of the Interior. Specifically, our support of the NCAI Resolution #JUN-00-043: "Demanding the Return of Trust Records to Local Agencies; Full Tribal Access to Records Necessary for Self-Government; and Establishment of a Negotiated Rulemaking Committee to Develop Trust Reform Regulations with the Full participation of Indian Tribes and Individuals they are intended to Benefit.

In addition, I submit the ILWG position related to the content of P.L. 106-462 and S. 1340 and violations of Executive Orders No. 12875 "Enhancing the Intergovernmental Partnership" and Executive Order No. 12865 "Regulatory Planning and Review" and Executive Order No. 13084, providing for meaningful and timely input…….on matters that significantly or uniquely affect tribal communities" and Executive Order No. 13075 enacted to "encourage Indian tribes to develop their own policies to achieve program objectives" and that while "developing regulations use consensual mechanisms for developing regulations, including negotiated rulemaking….

P.L. 106-462 "the Indian Land Consolidation Amendments of 2000", the regulations developed to implement this law, and the proposed S.1340, have not adhered to the intent and directives contained in the aforementioned Executive Orders.

In closing I would like to submit the following pertinent documents into the record.

- "AMENDMENTS TO S. 1340", A SUMMARY AND ANALYSIS OF S.1340 PREPARED BY MS. SALLY WILLET, FORMER ADMINISTRATIVE LAW JUDGE, OHA – DOI; APRIL 2002.

- "THE INDIAN LAND WORKING GROUP'S POINTS AND CONCERNS" REGARDING THE NOVEMBER 7, 2000 ILCA AMENDMENTS AND S. 1340 AND ASSOCIATED TRUST "REFORM" REFORM MEASURES; MAY 2002.

- "FRACTIONATED INTERESTS IN LAND THAT IS HELD IN TRUST FOR NATIVE AMERICANS" BY ARVEL HALE, FORMER CHIEF APPRAISER, DOI – BIA, MAY 13, 2002.

- OKLAHOMA SUPREME COURT SOVEREIGNTY SYMPOSIUM, AN OVERVIEW OF INDIAN PROBATE PAST AND PRESENT", JUDGE SALLY WILLET, CHEROKEE TRIBE - MARCH 2002.

We will use the testimony we have given today, as well as the aforementioned documents, as a basis for further discussions with members of this Committee and staff, as we seek the much needed reform related to Indian ownership, use, and management of Indian trust allotments.

Our lands, and our future generations on these lands, are our lifeblood; we will no longer stand for being land rich and dirt poor; detached from our lands as your laws have tried to make us. As members of the Indian Land Working Group, we seek to reverse this trend. We are "Taking A Stand On Our Indian Land". We seek responsible use management and control of our land resources. We hope you will work with us. Thank you.